QUESTION PRESENTED

Whether the Cigarette Labeling and Advertising Act, which expressly forbids any legal requirement of a warning on cigarette packages other than that prescribed by Congress, and which also expressly forbids the imposition of any health-related "requirement or prohibition . . . under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter," 15 U.S.C. § 1334, permits courts to impose liability under state law in personal injury lawsuits for alleged inadequacies in the warning label or alleged improprieties in the advertising or promotion of properly labeled cigarettes.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT	1
1. The Lawsuit	2
2. The First Appeal	4
3. Proceedings on Remand	5
4. The Second Appeal	7
SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. THE LABELING AND ADVERTISING ACT PREEMPTS THE IMPOSITION UNDER STATE LAW OF ANY HEALTH-BASED OBLIGATIONS WITH RESPECT TO WARNINGS AND WITH RESPECT TO THE ADVERTISING OR PROMOTION OF PROPERLY LABELED CIGARETTES	11
A. This Case Involves Express and Implied, Field and Conflict, Preemption	11
B. The Labeling and Advertising Act, as a Whole and Through Its Express Preemption Provision and Declared Policies, Broadly Preempts State-Law Health-Based Obligations with Respect to Warnings and with Respect to the Advertising and Promotion of Properly Labeled Cigarettes	14
1. Congress Insisted on Establishing the Governing Policy in This Field	14
2. The Preemption Provision of the Act Broadly and Unequivocally Preempts State Law	17
3. The Act Sets Forth a Comprehensive Federal Scheme	20

TABLE OF CONTENTS—Continued

	Page
II. STATE COMMON LAW IMPOSING DUTIES TO ADD TO, OR SUBTRACT FROM, STATEMENTS WITH RESPECT TO WARNINGS OR ADVERTISING AND PROMOTION IS INCONSISTENT WITH THE LANGUAGE AND POLICIES OF THE LABELING AND ADVERTISING ACT	24
A. The Imposition of Duties Under the State Common Law of Torts Is Inconsistent with the Language of the Preemption Provision	25
B. The Imposition of Duties Under the State Common Law of Torts Is Inconsistent with the Scheme and Policies of the Labeling and Advertising Act	34
1. State Tort Law Would Interfere with the Policies of the Act	34
2. Congress Has Not Authorized Interference with Its Policies	40
C. The Claims Before This Court Are Preempted	45
CONCLUSION	50

TABLE OF AUTHORITIES

Cases	Page
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)	25
Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592 (1982)	30
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	11
Amrep Corp. v. FTC, 768 F.2d 1171 (10th Cir. 1985), *cert. denied*, 475 U.S. 1034 (1986)	22
Andre v. Union Tank Car Co., 213 N.J. Super. 51, 516 A.2d 277 (Super. Ct. Law Div. 1985), *aff'd*, 216 N.J. Super. 219, 523 A.2d 278 (Super. Ct. App. Div. 1987)	37
Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983)	39
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	26
Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)	14, 23
Boyle v. United Technologies Corp., 487 U.S. 500 (1988)	44
Burlington N.R.R. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987)	41
Burns v. Alcala, 420 U.S. 575 (1975)	20
Carlisle v. Philip Morris, Inc., 805 S.W.2d 498 (Tex. Ct. App. 1991)	37
Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981)	*passim*
Cotton v. Buckeye Gas Prods. Co., 840 F.2d 935 (D.C. Cir. 1988)	37
Crandon v. United States, 110 S. Ct. 997 (1990)	19
Dewey v. R.J. Reynolds Tobacco Co., 121 N.J. 69, 577 A.2d 1239 (1990)	37
Edmonson v. Leesville Concrete Co., 59 U.S.L.W. 4574 (U.S. June 3, 1991)	18
English v. General Elec. Co., 110 S. Ct. 2270 (1990)	12, 13, 14
Erie R.R. v. Tompkins, 304 U.S. 64 (1938)	25
Ex parte Virginia, 100 U.S. 339 (1880)	18
Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525 (1959)	26, 32, 44

TABLE OF AUTHORITIES—Continued

	Page
Felder v. Casey, 487 U.S. 131 (1988)	12
Feldman v. Lederle Labs., 97 N.J. 429, 479 A.2d 374 (1984)	28, 44
Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982)	11, 12, 26
Finn v. G.D. Searle & Co., 35 Cal. 3d 691, 677 P.2d 1147, 200 Cal. Rptr. 870 (1984)	37
Forster v. R.J. Reynolds Tobacco Co., 437 N.W.2d 655 (Minn. 1989)	33, 47, 49
Free v. Bland, 369 U.S. 663 (1962)	12
FTC v. Brown & Williamson Tobacco Corp., 580 F. Supp. 981 (D.D.C. 1983), *aff'd in relevant part*, 778 F.2d 35 (D.C. Cir. 1985)	22
FTC v. Carter, 636 F.2d 781 (D.C. Cir. 1980)	22
Garcia v. United States, 469 U.S. 70 (1984)	19, 42, 43
Gianitsis v. American Brands, Inc., 685 F. Supp. 853 (D.N.H. 1988)	47
Gillespie v. United States Steel Corp., 379 U.S. 148 (1964)	28
Gollust v. Mendell, 59 U.S.L.W. 4619 (U.S. June 10, 1991)	28
Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988)	32, 40, 41
Gunsalus v. Celotex Corp., 674 F. Supp. 1149 (E.D. Pa. 1987)	47
Hite v. R.J. Reynolds Tobacco Co., 396 Pa. Super. 82, 578 A.2d 417 (1990)	47
Hyland v. Kirkland, 157 N.J. Super. 565, 385 A.2d 284 (Super. Ct. Ch. Div. 1978)	30
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	9, 26
Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990)	*passim*
In re American Brands, Inc., 79 F.T.C. 255 (1971)	22
In re Lorillard, 80 F.T.C. 455 (1972)	16
International Paper Co. v. Ouellette, 479 U.S. 481 (1987)	*passim*
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	11, 13, 14, 38
Kilgore v. Younger, 30 Cal. 3d 770, 640 P.2d 793, 180 Cal. Rptr. 657 (1982)	30

TABLE OF AUTHORITIES—Continued

	Page
Kotler v. American Tobacco Co., 685 F. Supp. 15 (D. Mass. 1988), *aff'd*, 926 F.2d 1217 (1st Cir. 1990), *cert. pending*, No. 90-1473 (filed March 19, 1991)	47
Lowell Gas Co. v. Attorney General, 377 Mass. 37, 385 N.E.2d 240 (1979)	30
Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461 (1984)	12
Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960)	28
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	18
Norfolk & Western Ry. v. American Train Dispatchers Ass'n, 111 S. Ct. 1156 (1991)	9, 25, 41
Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493 (1989)	13
O'Brien v. Muskin, 94 N.J. 169, 463 A.2d 298 (1983)	28
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986)	42
Pacific Mut. Life Ins. Co. v. Haslip, 111 S. Ct. 1032 (1991)	33
Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987)	5, 26, 33, 47
Pennington v. Vistron Corp., 876 F.2d 414 (5th Cir. 1989)	5, 33, 47
Perez v. Campbell, 402 U.S. 637 (1971)	12
Perrin v. United States, 444 U.S. 37 (1979)	19
Phillips v. R.J. Reynolds Indus., Inc., 769 S.W.2d 488 (Tenn. Ct. App. 1988)	47
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	25, 44
Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988)	43
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	24
Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1947)	13
Rodriguez v. United States, 480 U.S. 522 (1987)	38

TABLE OF AUTHORITIES—Continued

	Page
Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988)	5, 33, 47
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	*passim*
Schwabacher v. United States, 334 U.S. 182 (1948)	26
Scindia Steam Nav. Co., Ltd. v. de los Santos, 451 U.S. 156 (1981)	28
Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964)	26
Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980)	24
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	11, 12
Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)	40
Spring Motors Distribs., Inc. v. Ford Motor Co., 98 N.J. 555, 489 A.2d 660 (1985)	28
State Dep't of Envtl. Protection v. Jersey Cent. Power & Light, 69 N.J. 102, 351 A.2d 337 (1976)	30
State v. First Nat'l Bank, 660 P.2d 406 (Alaska 1982)	30
Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987)	5, 33, 47
Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), *modified*, 615 P.2d 621 (1980), *cert. denied*, 454 U.S. 894 (1981)	33
Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)	42
Thornburg v. Gingles, 478 U.S. 30 (1986)	42
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979)	41
Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd., 474 U.S. 409 (1986)	39
TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976)	36
United States v. Rojas-Contreras, 474 U.S. 231 (1985)	41
United States v. Smith, 111 S. Ct. 1180 (1991)	44

TABLE OF AUTHORITIES—Continued

Statutes	Page
Warner-Lambert Co. v. FTC, 562 F.2d 749 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978)	22
Wisconsin Dep't of Indus. v. Gould, Inc., 475 U.S. 282 (1986)	44
Wisconsin Pub. Intervenor v. Mortier, 59 U.S.L.W. 4755 (U.S. June 21, 1991)	12
Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965), codified at 15 U.S.C. § 1331 *et seq.*	*passim*
Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970)	1, 15
Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984)	*passim*
Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 *et seq.*	18, 41
Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*	22
40 U.S.C. § 290	41
Occupational Safety and Health Act, 29 U.S.C. § 653(b)(4)	18
Price-Anderson Act, 42 U.S.C. § 2210 (1982)	40
Cal. Civ. Code § 45 (Deering Supp. 1990)	26
Ind. Code Ann. § 33-1-1.5-3 (West 1990)	26
Mass. Gen. Laws ch. 93A (1984)	26
N.J. Stat. Ann. § 2A:58C-2 (West 1990)	26
N.J. Stat. Ann. § 56:8-1 *et seq.* (West 1990)	30
Or. Rev. Stat. § 30.920 (1989)	26
S.C. Code Ann. ch. 73 (Law. Co-op. 1976)	26
Tex. Bus. & Com. Code Ann. § 17.46 (Vernon 1987)	26, 30
Tex. Bus. & Com. Code Ann. § 17.50 (Vernon 1987)	26, 30
Regulations	
29 Fed. Reg. 530 (1964)	15
29 Fed. Reg. 8324 (1964)	15
34 Fed. Reg. 7917 (1969)	16
34 Fed. Reg. 1959 (1969)	17, 23
37 Fed. Reg. 9108 (1972)	22

TABLE OF AUTHORITIES—Continued

Congressional Materials — Page

H.R. 3979, 98th Cong., 1st Sess. (1983) 19
H.R. Conf. Rep. No. 897, 91st Cong., 1st Sess. (1970) 23, 25
H.R. Rep. No. 289, 91st Cong., 1st Sess. (1969) 17, 23
H.R. Rep. No. 449, 89th Cong., 1st Sess. (1965) ...15, 16, 35
H.R. Rep. No. 805, 98th Cong., 2d Sess. (1984) 17, 19
S. Rep. No. 177, 98th Cong., 1st Sess. (1983) 17
S. Rep. No. 195, 89th Cong., 1st Sess. (1965) .....*passim*
S. Rep. No. 566, 91st Cong., 1st Sess. (1969) .....*passim*
Cigarette Advertising and Labeling: Hearing Before the Consumer Subcomm. of the Senate Comm. on Commerce, 91st Cong., 1st Sess. (1969) 16, 42
Cigarette Labeling and Advertising—1969: Hearings Before the House Comm. on Interstate and Foreign Commerce, 91st Cong., 1st Sess. (1969) 43
Cigarette Labeling and Advertising: Hearings Before the Senate Comm. on Commerce, Pt. 1, 89th Cong., 1st Sess. (1965) 15, 35, 38, 43
Cigarette Labeling and Advertising—1965: Hearings Before the House Comm. on Interstate and Foreign Commerce, 89th Cong., 1st Sess. (1965) 35, 42
111 Cong. Rec. 13893 (1965) 35
111 Cong. Rec. 13897 (1965) 38
111 Cong. Rec. 13901 (1965) 15, 35
111 Cong. Rec. 13930 (1965) 16
111 Cong. Rec. 14408 (1965) 35
111 Cong. Rec. 14410 (1965) 38
111 Cong. Rec. 14411 (1965) 35
111 Cong. Rec. 14414 (1965) 35
111 Cong. Rec. 16543 (1965) 43
115 Cong. Rec. 16165 (1969) 43
115 Cong. Rec. 16170 (1969) 23
115 Cong. Rec. 16189 (1969) 39
115 Cong. Rec. 16193 (1969) 39
115 Cong. Rec. 16294 (1969) 39
115 Cong. Rec. 16298 (1969) 24
115 Cong. Rec. 16299 (1969) 24

TABLE OF AUTHORITIES—Continued

Other Authorities — Page

The American Heritage Dictionary (1985) 27
Black's Law Dictionary (6th ed. 1990) 27
Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. Cal. L. Rev. 1423 (1980) 42
P. Huber, *Liability: The Legal Revolution and Its Consequences* (1988) 33
Letter to Rep. Thomas A. Luken (June 17, 1988) .. 34
Magat, Viscussi, & Huber, *Consumer Processing of Hazard Warning Information*, 1 J. Risk & Uncertainty (1988) 37
W. Prosser & W.P. Keeton, *Prosser and Keeton on Torts* (5th ed. 1984) 26, 27, 28
Restatement (Second) of Torts (1965) .....*passim*
L. Ross, *State Attorneys General: Powers and Responsibilities* (1990) 30
L. Tribe, *American Constitutional Law* (1988) ..12, 13, 40

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1038

THOMAS CIPOLLONE,

Petitioner,

v.

LIGGETT GROUP INC., A Delaware Corporation;
PHILIP MORRIS INCORPORATED, A Virginia Corporation;
and LOEW'S THEATRES, INC., A New York Corporation,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

STATEMENT

This case involves the Federal Cigarette Labeling and Advertising Act (the "Act" or the "Labeling and Advertising Act"), 15 U.S.C. § 1331 *et seq.*[1] The Act establishes a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby—

[1] Congress originally enacted the Federal Cigarette Labeling and Advertising Act in 1965. Pub. L. No. 89-92, 79 Stat. 282. The Act was amended by the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970). (Although that Act was enacted in 1970, its title refers to 1969, and its amendment to 15 U.S.C. § 1334(b) took effect on July 1, 1969. We therefore refer to that law as the 1969 Act.) The Act was further amended in 1984 by the Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200.

This brief generally cites to the 1969 version of the Act—the version addressed by both the court of appeals (Pet. App. 95a-108a) and the district court (*id.* at 109a-62a)—unless otherwise expressly indicated. Differences among the 1965, 1969, and 1984 Acts are pointed out where appropriate.

(1) the public may be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

§ 1331. In addition to setting forth the federal program to achieve the required balance of interests—including the precise warning to be placed on each package of cigarettes ("Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health"), § 1333 [2]—the Act broadly preempts state action (§ 1334):

(a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.

(b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.[3]

The court of appeals in this case held that the Labeling and Advertising Act preempted the state-law tort claims at issue in this Court.

1. *The Lawsuit.* Plaintiffs Rose D. Cipollone and her husband, Antonio Cipollone, brought this diversity action

[2] The label originally drafted by Congress in 1965 stated: "Caution: Cigarette Smoking May Be Hazardous to Your Health." Pub. L. No. 89-92, § 4, 79 Stat. 283. In 1984, Congress required rotation of four prescribed warnings. Pub. L. No. 98-474, § 4, 98 Stat. 2202.

[3] In the 1965 Act, Section 1334(b) stated: "No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." Pub. L. No. 89-92, § 5(b), 79 Stat. 283.

against respondents Liggett Group Inc., Philip Morris Incorporated, and Loew's Theatres, Inc.[4] Invoking various theories of New Jersey product liability law, the plaintiffs alleged that Mrs. Cipollone developed lung cancer because, for some 40 years, she smoked cigarettes manufactured by respondents. As developed in the third amended complaint, and as relevant here, the asserted liability of respondents was premised on their alleged failure to provide adequate warnings regarding smoking and health, breach of express warranties regarding smoking and health, fraudulent misrepresentations regarding smoking and health in advertising and promotion, and conspiracy to defraud the public regarding smoking and health. Pet. App. 17a; J.A. 81-94.[5]

Respondents raised the defense, among others, that those claims were preempted by the Labeling and Advertising Act to the extent that they asserted liability for any post-1965 conduct.[6] The district court rejected the preemption argument and struck the defense. Pet. App. 109a-62a. The court concluded that the Act's preemption provision, § 1334, applied only to statutes and adminis-

[4] Petitioner in this Court is Thomas Cipollone, as executor for the estates of both Rose Cipollone and Antonio Cipollone. The Rule 29.1 statement for respondents is set forth at footnote 2 of the Memorandum filed in response to the petition for certiorari.

[5] The express warranty claim was based on a New Jersey statute, N.J. Stat. Ann. § 12A:2-313(1), the State's version of the Uniform Commercial Code. *See* Pet. App. 44a-61a. *See also* U.C.C. §§ 2-714, 2-715 (remedy sections for breach of warranty).

Plaintiffs also asserted that respondents failed to use a safer alternative design for their cigarettes (what the court of appeals deemed the "design-defect claim") and that the risks of respondents' cigarettes simply outweighed their social utility irrespective of whether they could have been made safer and even though they were sold with the federal warning (the "generic risk-utility claim"). *See* Pet. App. 17a. Neither claim is before this Court. *See* note 9, *infra*.

[6] The Act took effect on January 1, 1966. 79 Stat. 284. It is undisputed that respondents' cigarettes have at all times since then been labeled in conformity with the Act.

trative regulations, not to requirements or prohibitions imposed by the state law of torts and enforced by courts and juries in actions for damages. Pet. App. 123a-30a. The court also concluded that Congress did not preempt state common law claims by "occupying the field" and that state common law standards were not in "irreconcilable conflict" with the Act. *Id.* at 146a-61a.

2. *The First Appeal.* On interlocutory appeal pursuant to 28 U.S.C. § 1292(b), a unanimous panel of the court of appeals reversed. Pet. App. 95a-108a. The court of appeals explained that the preemption provision, together with the remainder of the Act, effected a broad preemption of obligations respecting warnings, advertising, and promotion (*id.* at 105a):

> Congress has provided us with an explicit statement of the Act's purposes in section 1331. That statement reveals that the Act represents a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of national economy. . . . Moreover, the preemption provision of section 1334, read together with section 1331, makes clear Congress's determination that this balance would be upset by either a requirement of a warning other than that prescribed in section 1333 *or* a requirement or prohibition based on smoking and health "with respect to the advertising or promotion" of cigarettes. *See* 15 U.S.C. § 1334.

The court then concluded that duties such as those asserted by plaintiffs in their damages action were within the scope of the statutory preemption (*id.* at 105a-06a):

> [W]e accept the [respondents'] assertion that the duties imposed through state common law damage actions have the effect of requirements that are capable of creating "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." . . . [W]e conclude that claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act.

The court accordingly held (*id.* at 106a (footnote omitted)):

> that the Act preempts those state law damage actions relating to smoking and health that challenge either the adequacy of the warning on cigarette packages or the propriety of a party's actions with respect to the advertising and promotion of cigarettes. We further hold that where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act.

The court of appeals reversed the district court's order striking the preemption defense and remanded for application of its opinion to the various claims. Pet. App. 108a. This Court denied a petition for a writ of certiorari. *Cipollone v. Liggett Group, Inc.*, 479 U.S. 1043 (1987).[7]

3. *Proceedings on Remand.* On remand, the district court found that, under the court of appeals' ruling, post-1965 claims of failure to warn, conspiracy, intentional misrepresentation, and express warranty were preempted. *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664 (D.N.J. 1986). Petitioner conceded, and the court agreed, that the failure-to-warn claims, grounded either in strict liability or in negligence, were preempted under the court of appeals' ruling. *Id.* at 669, 673. Turning to the claims of intentional misrepresentation and conspiracy, the court found no tenable distinction between claims based on what was said and claims based on what was not said: "[h]av-

---

[7] All four of the other federal courts of appeals that have addressed the preemption question subsequently agreed with the Third Circuit's ruling. *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987).

ing concluded that the Court of Appeals meant to exempt defendants from liability for what they did say, it follows that they cannot be held liable for what they did not say." *Id.* at 673.[8] Finally, on the express warranty claim, the court stated: "this claim inevitably brings into question defendants' advertising and promotional activities, and is therefore preempted." *Id.* at 675.[9]

The case ultimately proceeded to trial on various non-preempted claims. After a five month trial, the jury returned a verdict rejecting plaintiffs' major claims alleging pre-1966 fraudulent misrepresentation and conspiracy.[10] On the pre-1966 claim that Liggett had failed adequately to warn Mrs. Cipollone of the health effects of smoking, the jury found that Liggett had failed adequately to warn but that 80% of the responsibility for Mrs. Cipollone's injuries was her own. Under New Jersey comparative fault rules, that apportionment of responsibility precluded liability. Finally, on the pre-1966 express warranty claim

[8] In finding these claims preempted, the court observed that "allegations that defendants 'ignored and failed to act upon' medical and scientific data . . . amount to nothing more than a failure to warn." 649 F. Supp. at 674. Likewise, the court found that a claim attempting "to make defendants liable for intentionally 'neutralizing' the effects of the federally-mandated warning labels by means of their advertising, by its own terms, . . . challenges conduct which would fall within the category of 'advertising' and is therefore preempted." *Ibid.*

[9] The district court held that plaintiffs' two other theories were not preempted—the "design defect" and "generic risk utility" claims. *See* note 5, *supra*. Trial proceeded on the design-defect claim, but the court directed a verdict for respondents on that claim at the close of the plaintiffs' case—ruling that plaintiffs had failed to prove their case—and that ruling was not appealed. *See* Pet. App. 19a-20a. No trial was held on the risk-utility claim because the district court concluded that the claim was barred by a New Jersey statute. *See id.* at 19a. That part of the judgment was subsequently set aside by the Third Circuit. *Id.* at 78a-80a. That ruling is not before this Court.

[10] These were the only claims left against respondents Philip Morris and Loew's Theatres, who did not manufacture the cigarettes smoked by Mrs. Cipollone before 1966. Pet. App. 19a.

against Liggett, the jury found, as to liability, that Liggett had breached express warranties regarding smoking and health and, as to damages, that Mrs. Cipollone had sustained no damages, while her husband had sustained damages of $400,000. *See* Pet. App. 20a-24a.[11]

4. *The Second Appeal.* On cross-appeals, the court of appeals reversed the judgment in favor of Antonio Cipollone on the express warranty claim because the district court's instructions erroneously precluded the jury from considering that Mrs. Cipollone understood the risks of smoking and disbelieved the claimed warranties. Pet. App. 44a-62a, 60a. Because of other instruction errors, the court also reversed and remanded for a new trial on the failure-to-warn judgment for Liggett. *Id.* at 28a-36a, 91a. The court of appeals, however, affirmed that part of the judgment holding that the Labeling and Advertising Act preempted the claims based on post-1965 failure to warn, advertising, and promotion—the failure to warn, express warranty, misrepresentation, and conspiracy claims. *Id.* at 88a-91a. Rejecting attempts by petitioner to draw a line between the failure-to-warn claims and intentional tort claims, the court observed that the latter claims "manifestly 'challenge[] . . . the propriety' of the defendants' 'actions with respect to the advertising and promotion of cigarettes.'" *Id.* at 90a. The

[11] Petitioner makes a variety of irrelevant, incomplete, and erroneous assertions about the evidence in this case, particularly as it relates to Mrs. Cipollone's awareness and understanding of the risks of smoking. We note only that (1) all of the evidence "demonstrat[ing] all of the facts which caused or influenced her to continue smoking once she was warned" was in fact admitted, not excluded, at trial (Tr. 4118-19); (2) after a five month trial the bulk of which focused on petitioner's allegations of pre-1966 conspiracy and fraud, the jury specifically rejected those allegations; and (3) in attributing 80% of the fault to Mrs. Cipollone on the failure-to-warn claim, the jury necessarily found, in the language of the jury instructions, that she "had an understanding and appreciation of the nature and extent of the health risks of cigarette smoking" and "voluntarily and unreasonabl[y] proceeded to encounter those risks" (Tr. 12,743). *See generally* J.A. 120-61.

court thus held that, under its prior decision, the Act preempted all four claims that are at issue in this Court.

SUMMARY OF ARGUMENT

Petitioner's claims are barred under any theory of preemption—express or implied, field or conflict. The Labeling and Advertising Act declares a federal policy demanding uniform federal standards in a prescribed area, creates a regulatory scheme that the Act itself deems comprehensive, and includes an express preemption provision as an integral part of that scheme. The state tort duties that petitioner seeks to impose on respondents come within the express preemption provision, conflict with the declared federal policy, and intrude on the field occupied by the Act.

I. As the language and background of the Act show, Congress has established a "comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." § 1331. Implementing that program, Congress has, among other things, required a specific warning on packages (§ 1333), decided initially that no warning should be required in advertising and later authorized the FTC to require such a warning (§ 1336(a)), ensured FTC regulation of deceptive advertising (§ 1336(b)), and called for regular reporting to Congress itself on the health consequences of smoking and advertising practices with regard to cigarettes (§ 1337). This scheme was the carefully crafted means "whereby" Congress chose to pursue its aim of "adequately inform[ing]" the public regarding health hazards of smoking through simple, consistent messages, while also protecting the national economy both generally and against the burdens of "diverse, nonuniform, and confusing labeling and advertising regulations." § 1331. And, to preserve the federal scheme, Congress included a broad preemption provision: it expressly preempted any requirement of other statements relating to smoking and health on packages (§ 1334(a)) as well as any state-law requirement or prohibition based

on smoking and health with respect to advertising or promotion of properly labeled cigarettes (§ 1334(b)). The Act thus makes clear that Congress did not intend for States to impose additional obligations with respect to warnings, or with respect to advertising and promotion, based on their own views about the relationship between smoking and health.

II. A. Obligations imposed by the state common law of torts—like obligations imposed under other types of state law—fall within the preempted area. The Act by its terms preempts any attempt to "require" additional warnings or to impose "requirement[s] or prohibition[s]" on advertising and promotion "under State law." The phrase "under State law" clearly includes state tort law (*see, e.g., Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156, 1163 (1991); *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972)); and a tort duty is by ordinary usage a "requirement" or "prohibition" (*see, e.g., Restatement (Second) of Torts* §§ 4 ("duty"), 402A comment *h* (failure to warn of product dangers)). This Court, in fact, has often made the common-sense point that, like other forms of legal duties, common-law tort duties do, and are designed to, "govern[] conduct and control[] policy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *see Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). Although petitioner and his *amici* try mightily to escape this self-evident conclusion, they cannot do so: the fact remains that tort duties impose requirements or prohibitions, regardless of the source of the state duty (common law or statute), the remedy employed to enforce the duty (damages or injunctions), the party initiating enforcement (private parties or the State), or the specificity of the duty (written directly to target cigarettes or not). None of those wishful distinctions is a reason to disregard the obvious meaning of Section 1334, which flatly preempts *any* state-imposed obligations in the area.

B. The imposition of state tort obligations would also interfere with the declared purposes of the Act. To per-

mit individual States, and indeed individual juries, to decide for themselves whether the warning required by Congress was adequate, or to set varying standards for the advertising and promotion of properly labeled cigarettes, would inevitably produce "diverse, nonuniform, and confusing" regulation and chaotic marketing conditions. § 1331. Congress meant to avoid just such upheaval by enacting a "comprehensive Federal program" (§ 1331) and by retaining for itself the right to balance the goals of "adequately inform[ing]" the public about smoking and health and of protecting "commerce and the national economy." Petitioner points to nothing in the Act that establishes what otherwise seems wholly implausible: that Congress was willing to let States strike an entirely different balance as long as they did so by means of the common law of torts, rather than by other varieties of state law. In fact, the broad wording of the Act, and the absence of a savings clause, show just the opposite.

C. The Act preempts all of the claims before this Court. The basic claims, premised on failure to warn, improperly attack the adequacy of the federal warning: by definition, they seek to establish a state-law duty to provide *additional* warnings regarding smoking and health. The remaining claims (express warranty, misrepresentation, and conspiracy) impermissibly seek to impose state-law requirements and prohibitions on the advertising or promotion of cigarettes. All of the claims, moreover, would necessarily lead to overlapping regulation on a state-by-state basis, contrary to the comprehensive *federal* program established by Congress.

ARGUMENT

I. THE LABELING AND ADVERTISING ACT PREEMPTS THE IMPOSITION UNDER STATE LAW OF ANY HEALTH-BASED OBLIGATIONS WITH RESPECT TO WARNINGS AND WITH RESPECT TO THE ADVERTISING OR PROMOTION OF PROPERLY LABELED CIGARETTES.

In judging whether state law is preempted under the Supremacy Clause because it is incompatible with federal law, "[t]he purpose of Congress is the ultimate touchstone." *Ingersoll-Rand*, 111 S. Ct. at 482 (internal quotation marks omitted); *see Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). To discern the pertinent congressional intent, the Court must "examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand*, 111 S. Ct. at 482. In the present case, all of those sources lead directly to the conclusion that, under the Labeling and Advertising Act, the labeling, advertising, and promotion of cigarettes may not be subjected to state-law obligations based on the relationship between smoking and health.

A. This Case Involves Express and Implied, Field and Conflict, Preemption.

The Court has observed that "[p]re-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983) (internal quotation marks omitted); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Within the category of implied preemption, moreover, the Court has recognized at least two types of preemption—field preemption, where a statute occupies a field exclusively for federal control, so that no state action is permissible in that field; and conflict preemption, where a statute establishes a federal program or policy that preempts those particular state measures or actions whose effects "interfere[] with" or "stan[d] as an obstacle to

the accomplishment of the full purposes and objectives of Congress." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (internal quotation marks omitted); *see English v. General Elec. Co.*, 110 S. Ct. 2270, 2275 (1990); *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Free v. Bland*, 369 U.S. 663, 666 (1962).[12]

Although (as shown below) all of those categories are applicable in this case, it is hardly necessary to discuss them, nor appropriate to treat them (as petitioner does), as if they were wholly unrelated to one another. As the Court has pointed out, the preemption categories are not "rigidly distinct." *English*, 110 S. Ct. at 2275 n.5. An express preemption provision always defines a field within which States may not act. And field preemption "may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation" in order to prevent disuniformity. *Ibid.* Similarly, in determining the scope of an express preemption provision, the Court looks—as in an implied preemption analysis, and as in any case of statutory construction—to the structure, purposes, and background of the statute as a whole. *See, e.g., Wisconsin Pub. Intervenor v. Mortier*, 59 U.S.L.W. 4755, 4757-60 (U.S. June 21, 1991); *Shaw*, 463 U.S. at 95-100; L. Tribe, *American Constitutional Law* § 6-26, at 482 n.8 (1988) ("preemption is ultimately a matter of *construing* a federal

[12] If the *effect* of a state measure is to frustrate the federal policy—either the congressional goals *or* the operation of the congressionally chosen methods to achieve them—the state measure cannot be saved because of its purpose or its importance to the State. *See Felder v. Casey*, 487 U.S. at 138 ("'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law'" (quoting *Free v. Bland*, 369 U.S. at 666)); *de la Cuesta*, 458 U.S. at 153; *Perez v. Campbell*, 402 U.S. at 651-52 (effect rather than purpose of state law governs preemption analysis); *International Paper*, 479 U.S. at 494, 498 n.19 (same); *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 477 (1984).

statute").[13] In a case like this, therefore, it is hardly surprising that the language of the preemption provision, the avowedly "comprehensive" scheme established by the Act, and the particular policies set forth by Congress—each one of which reflects the congressional intent embodied in the others—all point to the same conclusion: preemption of state-imposed health-based obligations with respect to warnings or to advertising and promotion. This case, in short, is a case involving express and implied, field and conflict, preemption.[14]

This conclusion takes full account of the general presumption, invoked by petitioner (Pet. Br. 13, 18), against inferring congressional intent to displace traditional state regulation. *See, e.g., English*, 110 S. Ct. at 2275; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). What petitioner fails to appreciate is that, as is apparent on the face of the statute, Congress *did* deliberately oust the States of their traditional authority to use core police powers in the area covered by the Act. Far from a case requiring inferences from policies not addressed to the question of state involvement, this case thus concerns a statute that expressly preempts state activity and expressly declares a policy of nationwide uniformity. §§ 1331, 1334. Even without such express provisions (*e.g., International Paper, supra*), "this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory

[13] We note that, contrary to what petitioner contends, the presence of an express preemption provision does not prevent the Court from applying principles of implied preemption as well. *See, e.g., Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514-19 & n.12 (1989); *Jones v. Rath Packing Co.*, 430 U.S. at 532-43.

[14] *See* L. Tribe, *American Constitutional Law* § 6-25, at 481 n.14 (1988) (The "categories of preemption are anything but analytically air-tight. For example, even when Congress declares its preemptive intent in express language, deciding exactly what it meant to preempt often resembles an exercise in implied preemption analysis. So too, implied preemption analysis is inescapably tied to the presumption that Congress did not intend to allow state obstructions of federal policy, a central inquiry in conflict preemption analysis.").

schemes." *English*, 110 S. Ct. at 2275. With the Labeling and Advertising Act's provisions, the preemptive intent is "'clear and manifest.'" *Ibid.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. at 525).

B. The Labeling and Advertising Act, as a Whole and Through Its Express Preemption Provision and Declared Policies, Broadly Preempts State-Law Health-Based Obligations with Respect to Warnings and with Respect to the Advertising and Promotion of Properly Labeled Cigarettes.

The Labeling and Advertising Act marks out a carefully defined field for exclusive federal control: any health-based obligations imposed with respect to warnings or on advertising and promotional activities. We do not contend that the Act occupies "the entire field of smoking and health." Pet. Br. 15, 31-32. For example, the field does not include state-law obligations to avoid marketing cigarettes with manufacturing defects or to use a demonstrably safer alternative design for cigarettes, at least to the extent that the obligations do not involve the information communicated to consumers. Also outside the field are informational duties regarding smoking and health imposed on broadcasters and similar third parties unrelated to the cigarette industry. *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969). Similarly, the Act does not cover laws that restrict the sale of cigarettes to minors or the use of cigarettes in public places. *See* Pet. Br. 31. But within the field that the Act does occupy, federal control is complete, as its background, language, structure, and policies make clear.

1. *Congress Insisted on Establishing the Governing Policy in This Field.*

The background of the Labeling and Advertising Act reveals unmistakably that Congress meant to set and monitor policy with respect to the obligations imposed on cigarette manufacturers. Prior to 1965, there was no statutory or administrative regulation specifically addressed to cigarette labeling or advertising; and although product liability actions had been brought against cigarette manufacturers, no liability for properly manufactured cigarettes had ever been imposed. In 1964, the Surgeon General's Report concluded that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action." [15] Almost immediately, a number of States proposed laws to regulate cigarette advertising and labeling,[16] and the FTC promulgated a regulation that would have required a warning to be placed both on cigarette packages and in advertisements. 29 Fed. Reg. 530 (1964); 29 Fed. Reg. 8324 (1964). Preempting these initiatives, Congress in 1965 itself decided to act definitively with respect to the subject of smoking and health by enacting the first cigarette labeling and advertising statute. Pub. L. No. 89-92, 79 Stat. 282. It returned to the field, adjusting its program, in 1969 and again in 1984. Pub. L. No. 91-222, 84 Stat. 87; Pub. L. No. 98-474, 98 Stat. 2200.

The actions taken by Congress, and reflected in the Act, rested on several fundamental considerations. To begin with, Congress concluded that while "the individual must be safeguarded in his freedom of choice—that he has the right to choose to smoke or not to smoke— . . . the individual has the right to know that smoking may be hazardous to his health." 1965 House Report 3-4; S. Rep. No. 195, 89th Cong., 1st Sess. 4 (1965) ["1965 Senate Report"]. Congress then determined that the proper approach was to have a single, *federal* legislative response: "The determination of appropriate remedial action in this area . . . is a responsibility which should be exercised

---

[15] *See* H.R. Rep. No. 449, 89th Cong., 1st Sess. 2 (1965) ["1965 House Report"] (quoting *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* 33 (1964)).

[16] *See, e.g.*, 111 Cong. Rec. 13901 (1965) (Sen. Moss); *Cigarette Labeling and Advertising: Hearings Before the Senate Comm. on Commerce*, Pt. 1, 89th Cong., 1st Sess. 39 (1965) (Sen. Magnuson) ["*1965 Senate Hearings*"].

by the Congress after considering all facets of the problem." 1965 House Report 3. This national solution was required because Congress saw the need to balance several interests: on the one hand, it had to consider the "broad implications in the field of public health and health research"; on the other, it had to take account of the "potentially far-reaching consequences for a number of sectors of our economy. The entire tobacco raising and manufacturing industry, and the numerous businesses which market tobacco products, are involved." *Ibid.* Still more particularly, Congress was concerned that a variety of different requirements in the area not only could unduly impede commerce but "could create chaotic marketing conditions and consumer confusion." *Id.* at 4; 1965 Senate Report 4-5.[17]

These purposes and the delicacy of the national balance among them are reflected in Congress's repeated insistence that *it*, with carefully defined and closely monitored assistance from federal agencies, would determine policy in the area of labeling and advertising. Thus, Congress from the beginning has tightly controlled the actions of even *federal* agencies in the field. Not only did it preempt proposed FTC action in 1965, but in 1969 Congress again prohibited a proposed FTC rule (34 Fed. Reg. 7917), and then insisted that future proposed FTC action be submitted for congressional review (§ 1336(a)).[18] Likewise, when the Federal Communications Commission announced in 1969 that it was considering a ban on broadcast adver-

[17] *See Cigarette Advertising and Labeling: Hearing Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 177 (1969) (Sen. Moss) ["*1969 Senate Hearings*"] ("[A]ll agree on the fact that there certainly ought to be a preemption of State action. This is a national problem and it must be dealt with on a national basis."). *See* 111 Cong. Rec. 13930 (1965) (Sen. Morton) ("The problem of smoking and health is national in scope. It is clearly one in which Congress should occupy the field."); 1965 Senate Report 4; 1965 House Report 3-4.

[18] In 1972, an administrative consent decree required in advertising the same warning that Congress had required on packages. *In re Lorillard*, 80 F.T.C. 455 (1972).

tising of cigarettes (34 Fed. Reg. 1959), Congress preempted that proposal (adopting the ban itself) so as to prevent "intrusion by the [FCC and the FTC] into basic areas of policymaking *which* [*Congress*] *has reserved to itself*." H.R. Rep. No. 289, 91st Cong., 1st Sess. 5 (1969) (emphasis added). And throughout the history of the Act, Congress has required the submission of current information about both the health and commerce aspects of the issues,[19] and it has twice made various adjustments to the Act—notably, modifying the language of the warning in both 1969 and 1984, requiring that advertisements carry the warning in 1984, and adopting the present language of Section 1334(b) in 1969.[20] As we next discuss, nothing in the Act supports the view that, despite its dominant role in setting and implementing policy in this field, Congress meant to leave room for the States to impose their own requirements, according to their separate views of proper policy, as well.

2. The Preemption Provision of the Act Broadly and Unequivocally Preempts State Law.

Section 1334 of the Labeling and Advertising Act expressly ousts States of any ability to compete with the federal regime. As the Court has said of a similar provision, "'[t]he pre-emption clause is conspicuous for its

[19] The Act requires annual reports from the FTC and the Secretary of Health and Human Services (originally, Health, Education, and Welfare) on the health consequences of smoking, on advertising practices, and on the effectiveness of labeling. § 1337. Congress has annually received the required reports and has held its own hearings. *See* S. Rep. No. 566, 91st Cong., 1st Sess. 3-10 (1969) ["1969 Senate Report"]; S. Rep. No. 177, 98th Cong., 1st Sess. 3-7 (1983); H.R. Rep. No. 805, 98th Cong., 2d Sess. 6-7 (1984).

[20] Although the 1984 Act is not involved in this case, it reconfirms Congress's decision to keep for itself (and to exercise) active control of the statutorily defined field. That Act specified a new regime requiring four rotating warnings and demanded that the language be placed not only on cigarette packages but also in cigarette advertising, thus taking the matter of affirmative advertising requirements from FTC control. Pub. L. No. 98-474, § 4(a)(2) and (3), 98 Stat. 2202.

breadth.'" *Ingersoll-Rand*, 111 S. Ct. at 482 (quoting *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990)). Section 1334(a) declares that "no" statement "relating to" smoking and health may be required on any package. And Section 1334(b) declares that "[n]o requirement" and no "prohibition" that is "based on smoking and health" may be "imposed under State law with respect to the advertising or promotion" of properly labeled cigarettes.

These terms are obviously sweeping. They expressly extend to both "misfeasance" and "nonfeasance" (Pet. Br. 16)—what one says and what one fails to say—for they preempt both "prohibition[s]" and "requirement[s]."[21] They refer to any imposition "under State law," making no distinctions among the various branches of government (legislative, executive, or judicial), or government entities (including a jury), that might impose the requirement or prohibition.[22] Preemption extends to any imposition under state law that requires or prohibits certain conduct, whether under a statute targeted at cigarettes or under a general standard as applied to cigarettes judicially or administratively; it is not confined to "statute[s], injunction[s], or executive pronouncement[s]" (Pet. Br. 20) or to actions of "administrative agencies, counties, and municipalities" (Pet. Br. 23). And there is neither a savings clause nor any exception stated for any particular type of law, including the common law of torts.[23]

---

[21] Petitioner himself states: "'Prohibition' is nothing more than the flip side of 'requirement,' proscribing certain behavior as opposed to demanding it." Pet. Br. 24.

[22] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."); *Ex parte Virginia*, 100 U.S. 339, 347 (1880) ("A State acts by its legislative, its executive or its judicial authorities."); *Edmonson v. Leesville Concrete Co.*, 59 U.S.L.W. 4574, 4577 (U.S. June 3, 1991) (jury is "quintessential governmental body").

[23] Congress plainly knows how to include an adequate savings clause. *See, e.g.*, 15 U.S.C. § 4406(c) (Smokeless Tobacco Act); 29

This Court has said: "Where, as here, Congress has expressly included a broadly worded pre-emption provision in a comprehensive statute . . . , [the Court's] task of discerning congressional intent is considerably simplified." *Ingersoll-Rand*, 111 S. Ct. at 482 (discussing preemption provision of ERISA). Here, the preemption provision not only is broadly worded but plays a crucial role in a comprehensive scheme, as discussed below. The preemption provision, by "the normal reach of its words" (*Garcia v. United States*, 469 U.S. 70, 76 (1984)), whether read alone or with reference "to the design of the statute as a whole and to its object and policy" (*Crandon v. United States*, 110 S. Ct. 997, 1001 (1990)), covers *any* state-law health-based obligation with respect to warnings or with respect to the advertising or promotion of cigarettes, whether imposed for speaking or for failing to speak.

Although petitioner tries to narrow the plain language of Section 1334(b) (Pet. Br. 18-22), noting that it was differently worded prior to 1969 (*see* note 3, *supra* (quoting language)), that effort is fruitless. There is simply no reasonable way to read the existing language of the provision ("no requirement or prohibition . . . shall be imposed") as anything other than what it is: a broad preemption of all state-law health-based requirements or prohibitions with respect to advertising or promotion of cigarettes. What petitioner wants to do, in essence, is to rewrite the provision to say: "Except for some requirements and prohibitions, no requirement or prohibition shall be imposed . . . ." That endeavor runs afoul of the simplest canon of statutory construction: that a statute usually means what it says. *See, e.g., Perrin v. United*

U.S.C. § 653(b)(4) (Occupational Safety and Health Act). Indeed, in 1983, the proposed amendments to the Labeling and Advertising Act originally included a clause stating that the Act "shall not relieve any person from liability at common law or under state statutory law to any other person" (H.R. 3979, § 5, 98th Cong., 1st Sess. (1983)). The House Committee eliminated the provision from the bill that became the 1984 Act. H.R. Rep. No. 805, *supra*, at 7.

States, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975).[24]

3. *The Act Sets Forth a Comprehensive Federal Scheme.*

The preemption provision of the Labeling and Advertising Act is part of an integrated and avowedly "comprehensive" scheme (§ 1331) that first defines a delicately balanced policy and then specifies the means to pursue it. Any health-based obligation imposed under state law with respect to the labeling, advertising, or promotion of cigarettes would conflict with the policy and impair the scheme.

The Act begins with a declaration of policy, announcing that it "establish[es] a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health." § 1331. It then sets out the several congressional objectives to be pursued by the Act: "the public [should] be adequately informed that cigarette smoking may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes" (§ 1331(1)); and "commerce and the national economy [should] be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health" (§ 1331(2)). And far from simply stating these objectives as broad aspirations, the Act specifically ties these ends to its selected means, insisting that the goals will be met and accommodated *through* the federal program established by the Act: the Act creates the program "whereby" the stated goals are to be met, and the objective of providing adequate information is to be accom-

[24] Petitioner has never argued that, if the present version of Section 1334(b) is taken at face value (as it must be), then the scope of preemption was *narrower* for the period from 1966 to 1969. His references to the 1965 Act are, as they have been throughout the litigation, simply attempts to treat the 1969 Act as though it said something else. Moreover, and in any event, as we discuss at pages 20-23, *infra*, the preemptive force of the Act from 1966 through June 1969 was similarly broad.

plished "by" the package warning. § 1331. In short, through the program defined by the Act, consumers are to be warned adequately, the economy is to be protected, and "diverse" and "nonuniform" obligations on labeling and advertising are forbidden, so that commerce will not be "impeded" and consumers will not be "confus[ed]" by varying requirements.

The Act goes on to specify the comprehensive program—a program that is no less comprehensive for not being complex.[25] To furnish the adequate information to consumers, Congress required, on pain of criminal fine or injunction (§§ 1338, 1339), that all packages carry the warning written by Congress in the manner prescribed by Congress ("in a conspicuous place" and "in conspicuous and legible type"). § 1333.[26] With respect to advertising, after provisionally deciding in 1965 that the FTC was not to require any warning, Congress decided in 1969 to allow the FTC to proceed with such a requirement—while keeping the FTC on a short leash in so acting by requiring six months advance notice to Congress. § 1336(a). The same year, Congress banned broadcast advertising of cigarettes, insisting that it rather than the FCC should make this decision. § 1335. From the

[25] *Amici* American Cancer Society, *et al.* (ACS Br. 6-7), point to the program's simplicity to dispute the Act's assertion that it is "comprehensive." That argument confuses complexity with comprehensiveness. The scheme is simple because the problem being addressed is relatively discrete, and the field relatively narrow. Indeed, with respect to part of the field, Congress decided for a time that no requirements should be imposed at the state *or* federal level.

[26] The warning was originally prescribed, and revised, pursuant to a congressional determination that the warning must be "short and direct," "factual and succinct." 1965 Senate Report 4. Congress both in 1965 (*id.* at 4, 7) and in 1969 (1969 Senate Report 4) specifically declined to enact lengthier proposed warnings so as not to dilute the message. In 1969, the Senate Committee explained (*id.* at 13) that the longer warning that had passed the House was "so lengthy that it may lose its impact. It might also serve to create consumer confusion. . . . In the committee's view, the proposed warning statement is both scientifically accurate, and sufficiently short and pointed to constitute an effective warning."

beginning, moreover, Congress addressed itself to the question of affirmatively deceptive advertising by preserving, as part of its scheme, the FTC's authority to prevent, regulate, and correct any such practices. § 1336 (b).[27] That authority has in fact been regularly used: the FTC has closely attended to the advertising and promotional activities of cigarette companies. *See, e.g., FTC v. Carter*, 636 F.2d 781 (D.C. Cir. 1980); *FTC v. Brown & Williamson Tobacco Corp.*, 580 F. Supp. 981 (D.D.C. 1983), *aff'd in relevant part*, 778 F.2d 35 (D.C. Cir. 1985); *In re American Brands, Inc.*, 79 F.T.C. 255 (1971); 37 Fed. Reg. 9108 (1972). And, as previously noted (*see* page 17, *supra*), Congress has required and received annual reports on the health consequences of smoking (§ 1337(a)), on the effectiveness of cigarette labeling, and on current advertising and promotion practices (§ 1337(b)).

In all of these ways, Congress put in place a *federal* regulatory scheme to establish and enforce the standards of conduct to be observed by cigarette manufacturers and others in this area. The preclusion of state action thus preserves the required national perspective for the operation of the federal regime—a comprehensive regime designed to provide before-the-fact compliance, prevention, and correction based on federal standards. Congress could count on the fact that consumers would actually receive the warning that Congress deemed adequate (as indeed they have); moreover, because of the inherently public nature and widespread dissemination of advertising and promotional materials, Congress could rely on the FTC to police any misleading advertising or promotion and to report to Congress on advertising practices as well as the effectiveness of the warnings. Unlike state and local

[27] The Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, prohibits unfair or deceptive commercial practices (§ 45) and authorizes the FTC to issue cease and desist orders and to recover civil penalties (§ 45(b), (m)). *See also Amrep Corp. v. FTC*, 768 F.2d 1171 (10th Cir. 1985) (FTC may order corrective measures), *cert. denied*, 475 U.S. 1034 (1986); *Warner-Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) (same), *cert. denied*, 435 U.S. 950 (1978).

agencies, the Commission would have the experience, expertise, and sensitivity to the congressional balance to make the required judgments about what representations were truly deceptive, as well as the power to proceed against any violations on a nationwide basis. And under this regime, Congress could reasonably expect that deficiencies would be addressed at the federal level before they caused significant harm.

It has thus been apparent from the inception of the Act that the various States could not—consistent with the goals set by Congress and the means chosen to implement them—establish their own requirements for what cigarette manufacturers must and must not say about smoking and health. As Congress realized, it is not possible to have "a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health" (§ 1331) and, at the same time, have 50 State programs to deal with the same field. Thus, whether looked at in terms of the express language of preemption in § 1334 or in terms of the purposes and scheme set forth by Congress in § 1331 and the rest of the Act, the imposition of additional state requirements or prohibitions in this area cannot stand.[28]

[28] As we noted previously, this broad preemption was necessary even during the brief period before the language of Section 1334 (b) took on its present form. Indeed, the Senate, in proposing the modified language in 1969 (*see* H.R. Conf. Rep. No. 897, 91st Cong., 1st Sess. 4 (1970) (listing new language among Senate changes)), said that the new language merely "clarified" the preemptive effect of the 1965 Act. 1969 Senate Report 12.

The need for clarification was evident from a disparity in views about how far preemption relating to advertising had reached: for example, while the *Banzhaf* opinion suggested that the preemption provision reached only *requirements* of additional statements (405 F.2d at 1090, case discussed in 1969 Senate Report 7), the FCC Chairman himself, and evidently the FCC, expressed the view that the provision also preempted *prohibitions* applicable to advertising, including a ban on broadcast advertising. *See* 115 Cong. Rec. 16170 (1969) (Rep. Eckhardt); 34 Fed. Reg. 1959 (1969); *see also* 1969 House Report 4-5 (FCC proposal intrudes

II. STATE COMMON LAW IMPOSING DUTIES TO ADD TO, OR SUBTRACT FROM, STATEMENTS WITH RESPECT TO WARNINGS OR ADVERTISING AND PROMOTION IS INCONSISTENT WITH THE LANGUAGE AND POLICIES OF THE LABELING AND ADVERTISING ACT.

Petitioner cannot help but accept that the Labeling and Advertising Act preempts, in the words of one group of *amici*, "legislative and executive rulemaking—including promulgation of statutes, regulations, ordinances, and rules—by state and local legislatures and agencies." Brief *Amicus Curiae* of National League of Cities, *et al.*, at 6 (NLC Brief). He is thus left with the awkward argument that Congress somehow wanted to close off preemption at that point—that is, to preempt *only* obligations imposed by state "legislative and executive rulemaking," but not obligations imposed by state common law. That idea is utterly without basis: nothing in the Act reveals an intent on the part of Congress to allow States to impose numerous, varying obligations, provided only that they do so through the device of "state common law tort claims." Pet. Br. 13. To the contrary, the preemption provision, and the Act as a whole, show unmistakably that Congress meant to preempt *all* state law imposing a duty to provide more warnings or adding requirements or prohibitions with respect to advertising and promotion.

---

on field occupied by Congress in 1965 Act), 37-38 (Rep. Moss: 1965 Act preempts "the field of controlling all advertising to the exclusion of the States"), 31 (Reps. Jarman, Dingell, and Adams) (same); 115 Cong. Rec. 16298 (1969) (Rep. Ryan), 16299 (Rep. Preyer) (expressing similar view). The 1969 amendment explicitly provided that requirements *and* prohibitions within this area were preempted, though it limited the preemption to those imposed "under State law." This congressional confirmation of the broader view of the preemptive reach of the 1965 Act is "entitled to great weight." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969); *see Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

A. The Imposition of Duties Under the State Common Law of Torts Is Inconsistent with the Language of the Preemption Provision.

Nothing in the preemption provision of the Act exempts state common law from its scope. As we have discussed, Section 1334(a), by its terms, preempts any attempt (state or federal) to require a different warning on cigarette packages, while Section 1334(b) preempts, with respect to advertising or promotion, any requirement or prohibition "imposed under State law."[29] Although petitioner points out that Congress did not specifically mention "common law tort claims" (Pet. Br. 18), that fact, while true, is beside the point: Congress did not specifically mention *any* kind of state law—including statutory law, which is preempted even in petitioner's view—but chose to rely instead on a term of general application.[30]

It is, in any event, far too late to argue seriously that the term "State law" does not naturally and necessarily include state common law. This Court put that question to rest in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), and it has not been revived. *See, e.g., Norfolk & Western Ry.*, 111 S. Ct. at 1163 (The phrase " 'all other law, including State and municipal law' is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew, based on its analysis of the legislative history, between positive enactments and common-law

---

[29] The term "State law" is not the only term of broad application in Section 1334(b). The statutory phrase "with respect to" is similar to the phrase "relates to," which this Court has recently described as " 'deliberately expansive' language," which is " 'designed to "establish [the preempted field] as exclusively a federal concern." ' " *Ingersoll-Rand*, 111 S. Ct. at 482 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)).

[30] Congress chose the phrase "State law" instead of the phrase "State statute or regulation," which passed the Senate. 1969 Senate Report 16; H.R. Conf. Rep. No. 897, *supra*, at 1. The term "regulation" is broad enough to cover common law (*see San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)), but the adopted language removed any question on that score.

rules of liability."); *Illinois v. City of Milwaukee*, 406 U.S. at 100 ("no reason not to give 'laws' its natural meaning" including "claims founded upon federal common law as well as those of a statutory origin"). Indeed, this Court has repeatedly found preemption of state common law, including tort law, without requiring any explicit reference to common law in the federal statute. *See, e.g., International Paper, supra; de la Cuesta, supra; Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959); *Garmon*, 359 U.S. at 247; *Schwabacher v. United States*, 334 U.S. 182 (1948).[31]

The crux of petitioner's argument, therefore, is not that state common law is not "State law," but that the common law of torts does not "require" anything or impose any "requirement[s]." Pet. Br. 19-22. But that argument is fundamentally at odds with the nature of tort law itself. It is, quite literally, hornbook law that the law of torts imposes liability for breach of a legal duty. W. Prosser & W.P. Keeton, *Prosser and Keeton on*

---

[31] To make a distinction between statutory and common law would also make no practical sense in the present context. For example, express warranty claims like petitioner's are based on statute (the Uniform Commercial Code). *See* note 5, *supra*; *Palmer*, 825 F.2d at 622. And monetary damages are quite commonly based on a wide range of state statutes: in addition to wrongful death and worker's compensation statutes, there is an ever-growing body of statutes that serve to codify, alter, or replace common-law torts, particularly in the area of product liability. *See, e.g.*, N.J. Stat. Ann. § 2A:58C-2 (West 1990) (failure to warn); Mass. Gen. Laws ch. 93A (1984) (same; *see Palmer, supra*); Ind. Code. Ann. § 33-1-1.5-3 (West 1990) (same); Or. Rev. Stat. § 30.920 (1989) (same); S.C. Code Ann. ch. 73 (Law. Co-op. 1976) (same); Tex. Bus. & Com. Code Ann. §§ 17.46, 17.50 (Vernon 1987) (deceptive advertising); Cal. Civ. Code § 45 (Deering Supp. 1990) (libel).

Indeed, if the Act preempted statutory but not common law, the result would be that a tort claim would go from not being preempted to being preempted on the day that a State codified a common law tort, as New Jersey did in 1987 for failure to warn.

Torts 4 (5th ed. 1984); *Black's Law Dictionary* 1489 (6th ed. 1990) ("[t]here must always be a violation of some duty owing to plaintiff"). The duty may be seen as an affirmative one (*e.g.*, a duty to use reasonable care or a duty to warn) or a negative one (*e.g.*, a duty not to market unsafe products or a duty to refrain from misrepresentation). But, in either event, a plaintiff bringing a tort claim is seeking to recover on the ground that the defendant failed to adhere to a required standard of conduct. *See Prosser & Keeton* 21-23.

If petitioner means somehow to suggest that a tort "duty" is nonetheless not a "requirement," his suggestion fails as a matter of plain English. A "duty" is "[a]n act or a course of action that is *required* of one by position, social custom, law, or religion." *The American Heritage Dictionary* 431 (1985) (emphasis added). A "requirement," in turn, is "something that is required" or "something *obligatory*." *Id.* at 1050 (emphasis added). To complete the circle, an "obligation" is "[a] *duty*, contract, promise, or other social, moral, or legal *requirement* that compels one to follow or avoid a given course of action." *Id.* at 857 (emphasis added). As a matter of accepted usage, therefore, it is plain that a "duty" and a "requirement" (and an "obligation") are one and the same.

It is thus entirely natural to find the same usage routinely reflected in tort law. For example, Section 4 of the Restatement (Second) of Torts says that "[t]he word 'duty' is used throughout the Restatement of this Subject to denote the fact that an actor is *required* to conduct himself in a particular manner." (emphasis added). Discussing use of the term "duty" with regard to issues of negligence, the Restatement observes that the term is "particularly valuable in describing the *requirement* that action shall be taken for the protection of the interests of others." *Id.*, comment *b* (emphasis added). Similar usage is found in connection with torts based upon strict liability, especially those involving a failure to give an adequate warning: "where [a seller] has reason to anticipate that danger may result from a particular use, . . . he may be *required* to give adequate warn-

ing of the danger . . . ." *Id.*, § 402A, comment *h* (emphasis added).[32] It is well recognized, therefore, that, whether defined in terms of fault or not, liability in tort law is based on "a departure from the conduct *required* of the actor by society for the protection of others, and it is the public and social interest which determines what is *required*." *Prosser & Keeton* 22 (emphasis added) (internal footnote omitted).[33]

This common usage does nothing more than reflect common knowledge: that common law regulates behavior just as statutes do. This Court made that very point more than three decades ago in *San Diego Building Trades Council v. Garmon*, 359 U.S. at 247, observing that "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive

---

[32] The common use of "require" to refer to tort duties is confirmed by the jury instructions in this case, which asked the jury to decide whether respondents were "required" to give warnings prior to 1966. Tr. 12,736, 12,737, 12,740. It is further confirmed by the *amicus* brief for the American Cancer Society, *et al.*, which states (at 5) that the obligations "imposed under state tort law . . . *require* all manufacturers to take reasonable steps to ensure that consumers receive adequate and non-deceptive information about the dangers of their products." (emphasis added).

Judicial decisions, too, reflect the common usage of "require" and "prohibit" to refer to tort and other duties enforced in private suits for monetary relief. *See, e.g., Gollust v. Mendell*, 59 U.S.L.W. 4619, 4621 (U.S. June 10, 1991) ("[p]rohibiting" short-swing insider trading by "strict liability rule"); *Ingersoll-Rand*, 111 S. Ct. at 484 ("requiring"); *Kalo Brick*, 450 U.S. at 325-26 ("require"); *Scindia Steam Nav. Co., Ltd. v. de los Santos*, 451 U.S. 156, 169-70 & n.16 (1981) (same); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 150 (1964) (same); *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 557 (1960) (same). *Cf. International Paper*, 479 U.S. at 495, 498 n.19 ("compel").

[33] *See Feldman v. Lederle Labs.*, 97 N.J. 429, 452, 479 A.2d 374, 386 (1984) (embracing language of § 402A, comment *j*: "In order to prevent the product from being unreasonably dangerous, the seller may be *required* to give directions or warning, on the container, as to its use.") (emphasis added); *see also O'Brien v. Muskin*, 94 N.J. 169, 180, 463 A.2d 298, 303 (1983); *Spring Motors Distribs. v. Ford Motor Co.*, 98 N.J. 555, 579, 489 A.2d 660, 672 (1985).

relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." More recently, in finding various state tort suits to be preempted by the Clean Water Act, the Court stated that "[t]he inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources." *International Paper*, 479 U.S. at 495; *see id.* at 498 n.19. More recently still, the Court made the point again in a case involving the preemptive effect of ERISA, noting (in language of particular relevance here) that "state courts, exercising their common law powers, might develop different substantive standards applicable to the same employer conduct, *requiring* the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Ingersoll-Rand*, 111 S. Ct. at 484 (emphasis added).

All of this notwithstanding, petitioner and his *amici* offer a number of theories to explain why a duty imposed by state tort law is not a "requirement" after all. They claim, for example, that common law duties cannot be requirements because they are enforced by damages (and not injunctions) and by private parties (not state officials). *See, e.g.*, Pet. Br. 19-20; NLC Br. 7, 9. They also argue that manufacturers subject to common law duties are not required to comply with these duties in any specific way or, indeed, to comply at all—given the "choice" of paying the damages and continuing the unlawful conduct. *See, e.g.*, Pet. Br. 20-21, 42-43; ACS Br. 17-18. None of these efforts succeeds in explaining away the obvious: that common law duties *are* requirements.

To begin with, in asserting that tort suits impose no requirements because they are initiated by private parties and end in damage awards, petitioner and his *amici* have confused two distinct points: whether a requirement exists and how it is enforced. As discussed in subsection IIC, *infra*, each claim in this case is based upon state law imposing a standard of conduct to which the manufacturers are held. The obligations established by those standards are every bit as much "requirements" as any obliga-

tions set by statute, inasmuch as the law attaches consequences to their violation. Whether the consequences are ultimately brought to bear by means of a prohibitory injunction or damages, whether the relief is sought by private parties or by the State, petitioner cannot escape the fact that the manufacturers are being subjected to standards set by, and enforced according to, state law. *See Kalo Brick*, 450 U.S. at 317-18 (preemption turns on " 'the nature of the activities which the States have sought to regulate rather than on the method of regulation adopted' ") (quoting *Garmon*, 359 U.S. at 243).[34]

Petitioner and his *amici* make a comparable, though different, mistake in arguing that a tort duty under common law is not a "requirement" because it does not mandate particular action. Here, they have mixed together the issue of whether there is a requirement with the issue of how specific it may be. In a failure to warn case, for example, the common law imposes upon manufacturers a duty to warn consumers about the dangers of using their products. That duty is a legal requirement, plain

[34] The theories put forth by petitioner are not even sound on their own merits. Tort duties are, in fact, often enforceable by injunction and by state officials. As to the former, see *Restatement (Second) of Torts* ch. 48 (1965) (injunctions); *id.* at 556-58 (Scope Note). As to the latter, state attorneys general typically not only have *parens patriae* power to bring suits to protect state residents (*see, e.g., Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982); *State Dep't of Envtl. Protection v. Jersey Cent. Power & Light*, 69 N.J. 102, 351 A.2d 337 (1976)) but also have widely recognized authority to bring suit to protect the public against violations of common law duties—notably, to prevent misrepresentations to consumers (*e.g., Hyland v. Kirkman*, 157 N.J. Super. 565, 385 A.2d 284 (Super. Ct. Ch. Div. 1978); *Lowell Gas Co. v. Attorney General*, 377 Mass. 37, 385 N.E.2d 240 (1979); *State v. First Nat'l Bank*, 660 P.2d 406 (Alaska 1982); *Kilgore v. Younger*, 30 Cal. 3d 770, 797, 640 P.2d 793, 809, 180 Cal. Rptr. 657, 673 (1982)). In addition, most state attorneys general have specific power to enforce statutes barring deceptive advertising (the same statutes that may underlie private damages suits for misrepresentation, *see, e.g.*, Tex. Bus. & Com. Code Ann. §§ 17.46, 17.50 (Vernon 1987)). *See* N.J. Stat. Ann. § 56:8-1 *et seq.* (West 1990); L. Ross, *State Attorneys General: Powers and Responsibilities* 207-11 (1990).

and simple. State law could, of course, go on to impose more specific requirements—as, for instance, the Labeling and Advertising Act does, actually detailing what the exact warning must be—but the absence of such *specific* requirements does not change the fact that a *general* requirement exists. That is all that is needed ("no requirement or prohibition") to bring state law within the preemptive scope of the Act. *See Garmon*, 359 U.S. at 244 & n.3 (preemption applies equally to "specialized" statute and to "tort law of general application").[35]

Petitioner and his *amici* also insist that state tort law does not "require" anything because, as they see it, manufacturers can just pay the damages and ignore the duty. But even if the premise were correct (which it plainly is not, as discussed below), it would not make the duty any less of a duty. A manufacturer could likewise decide that it was willing to pay repetitive fines for violation of a statutory duty, but that choice would not mean that the duty would then cease to exist. Indeed, short of remedies that make it physically impossible to disobey the law (*e.g.*, the jailing of individuals), persons and corporations always have a choice between compliance and accepting the consequences of disobedience. To say that, in every such case, compliance is "voluntary" and not "re-

[35] *Amici Curiae* National League of Cities, *et al.* (NLC Br. 28 & n.23), tries to find a partial avenue of escape through the words "based on smoking and health." But even petitioner uses that phrase interchangeably with "health-related" (Pet. Br. 15 n.17), as does, for example, the 1969 Senate Report (at 1). In any event, there is no indication in the Act that Congress was unconcerned about health-based requirements that forced changes in warnings or in advertising materials, provided that they were based on more broadly defined duties that did not specifically target smoking and health—requirements that ultimately would still be "based on smoking and health" in the ordinary sense of those words. On the contrary, it seems evident, and petitioner himself does not deny, that Congress meant to foreclose States from applying even their general laws if they would have the *effect* of imposing such requirements. Of course, all of the claims before this Court involve allegations that respondents breached duties with regard to information *about smoking and health*.

quired" is to take a very peculiar view of the compulsive force of legal obligations.[36]

This Court, quite understandably, has declined to take that view. In repeatedly finding preemption of common law actions for damages, it has necessarily rejected the notion that the obligation to pay damages need not force any change in conduct. For example, in *WDAY, Inc.*, 360 U.S. 525, the Court could have permitted a libel suit against a broadcast station for broadcasting material required by federal law, reasoning (along the line pressed by petitioner) that the station was free to do both: broadcast the material and then pay any ensuing damages to the injured parties. Similarly, in *Kalo Brick*, 450 U.S. 311, the Court could have declined to find preemption on the ground that the railroad was not "prohibited" by the threat of tort damages from abandoning a disputed rail line (as required by the ICC), having instead the option to abandon the line anyway and pay damages for that action. And in *International Paper*, 479 U.S. 481, the Court could have held that state tort actions were not preempted because they do not "compel" any change in conduct whatsoever and, hence, do not "regulate" the defendants' out-of-state discharges. Yet the Court did nothing of the kind: in each of those cases, the Court found preemption of the state action without regard to the existence of this hypothetical "choice." [37]

---

[36] It seems utterly illogical, for example, to think that a statute providing for a $100 fine would compel a change in behavior but potentially limitless awards of damages under common law would not. Yet if petitioner means that *no* state law providing for monetary sanctions is preempted (because anyone could just pay and go on as before), he is largely reading Section 1334 out of the Act.

[37] There might conceivably be circumstances—involving, for example, a one-time event or relatively *de minimis* sanctions— where it would be rational to expect a manufacturer simply to absorb the cost of a monetary award. *Cf. Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (employer might pay one-time worker's compensation award without complying with state safety standard). Whatever the scope of those circumstances, however, they cannot extend to a situation in which prospective plaintiffs will challenge

Hypotheticals aside, it is fanciful to think that any manufacturer can indefinitely pay damages, perhaps including punitive damages, without conforming to the required standard. Responding to this very argument in a suit like the present one—that "any monetary damages awarded would not compel a manufacturer to change its label for, after all, 'the choice of how to react is left to the manufacturer' "—the First Circuit remarked: "This 'choice of reaction' seems akin to the free choice of coming up for air after being underwater." *Palmer*, 825 F.2d at 627. The First Circuit went on to recognize that, in the real world, "[o]nce a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability." *Id.* at 627-28; *see also* P. Huber, *Liability: The Legal Revolution and Its Consequences* (1988).[38] To use again the words from *Garmon*, "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy" (359 U.S. at 247); and the use of that method to control policy can defeat efforts

---

the same continuing course of conduct over several decades and seek compensatory and punitive damages without any ascertainable limit.

[38] The court thus found the tort claims in that case to be barred, noting that "[e]ffecting such a change in the manufacturer's behavior" by force of law "is the very action preempted by § 1334 of the Act." *Palmer*, 825 F.2d at 627-28. *Accord, Pennington*, 876 F.2d at 420-21; *Roysdon*, 849 F.2d at 234-35; *Stephen*, 825 F.2d at 313; Pet. App. 106a; *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 659 (Minn. 1989).

Indeed, a manufacturer's choice not to change its conduct after adverse jury verdicts could well give rise to punitive damages. Such damages, of course, are not compensatory at all, but directed solely at retribution for and deterrence of misconduct, and therefore would not come within even petitioner's view that compensatory relief is non-regulatory. *See Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1044-45 (1991); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 47 (Alaska 1979), *modified*, 615 P.2d 621 (1980), *cert. denied*, 454 U.S. 894 (1981).

by Congress to establish federal policy, just as much as a statute or an administrative regulation could do.[39]

B. The Imposition of Duties Under the State Common Law of Torts Is Inconsistent with the Scheme and Policies of the Labeling and Advertising Act.

As we have discussed (*see* pages 14-23, *supra*), Congress made quite clear in the Labeling and Advertising Act that it did not want manufacturers to be subject to state-by-state requirements based upon what each State thought to be appropriate messages about smoking and health. Rather, Congress deliberately chose to put into place a national solution to a national problem. *See* pages 15-16 and note 17, *supra*. What petitioner proposes—allowing the States to impose additional obligations under their common law—would effectively undo that solution.

1. *State Tort Law Would Interfere with the Policies of the Act.*

To start with, to have warnings and advertising material controlled by the law of every State would "create chaotic marketing conditions" (1965 Senate Report 4), directly contrary to the stated aim of protecting commerce from "diverse" and "nonuniform" regulations. § 1331. The FTC has pointed out, for example, that if States could require their own warnings in cigarette advertisements, "[t]his would make it virtually impossible to advertise cigarettes on a national basis." Letter to Rep. Thomas A. Luken (June 17, 1988) at 6. The same barrier, in fact, would naturally be created by *any* health-related requirement or prohibition imposed on the content of advertising from State to State. The alternative would be for manufacturers to abandon national marketing altogether and to package and advertise their products according to the varying standards of each State. But this state-enforced disuniformity, as Congress anticipated, would create significant obstacles to "commerce and the national economy." § 1331.[40]

[39] We do not understand petitioner to dispute that a statute requiring an additional cigarette warning, enforceable by a private cause of action for damages, would be preempted by the plain language of Section 1334. Given that fact, it would attribute to Congress an irrational intent to hold that the same cause of action is permitted when the source of the duty is state common law. *See* note 31, *supra*.

The fact that state *common* law would be imposing the additional requirements only makes matters worse. Under that system, manufacturers would be subject to different standards of conduct applied retroactively on an *ad hoc* basis by judges and juries throughout 50 States. Any particular verdict would leave the next jury in the next case free to reach its own judgment, even about conduct that the manufacturer adopted in response to the previous verdict. That uncertainty is aggravated by the fact that each verdict itself gives a manufacturer little precise guidance about how to meet its obligations, typically telling it only what was not adequate, not what would be. Thus, while one jury might conclude that the federal warning was *not* sufficient or that advertisements showing attractive smokers were "misleading," such a judgment would not establish that any particular warning *was* sufficient or that different advertisements (for instance, showing attractive landscapes) were acceptable. In short, the common law would impose requirements by trial and error, a much more disruptive process than the setting of requirements (concededly preempted) by a state legislature. *See International Paper*, 479 U.S. at 496 (common law rules "often are 'vague' and 'indeterminate'" and "would undermine the important goals of efficiency

[40] *See, e.g.*, 1965 Senate Report 4; 1965 House Report 4; 111 Cong. Rec. 13901 (1965) (Sen. Moss), 14408 (Rep. Smith), 14411 (Reps. Rumsfeld and Springer), 14414 (Rep. Nelsen), 13893 (Sen. Magnuson); *1965 Senate Hearings* 166-67 (Dr. Thomas Carlile, Chairman, Committee on Tobacco and Cancer of the American Cancer Society); *Cigarette Labeling and Advertising—1965: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 89th Cong., 1st Sess. 70 (1965) (FTC Chairman Paul Rand Dixon) ["*1965 House Hearings*"].

and predictability"); *Ingersoll-Rand*, 111 S. Ct. at 484 ("different substantive standards" imposed by common law decisions would be "fundamentally at odds with the goal of uniformity").

To have obligations imposed by state common law would also make statements relating to smoking and health more "diverse" and more "confusing." In the scheme adopted by Congress, the warnings required of manufacturers are, and are designed to be, clear and straightforward. Equally important, they are the same regardless of the particular manufacturer or the particular brand. The simplicity of this program is anything but accidental. Congress rejected proposals to require more elaborate warnings, on the ground that they would detract from, not add to, the strength of the existing warning. *See* note 26, *supra*.

What petitioner suggests, however, would turn the federal program into nothing more than a starting point, leaving juries free to conclude, on the basis of the evidence in a single case, that Congress was mistaken. It is not difficult to imagine that, as this process plays out, juries in different States would subject different manufacturers to different standards, perhaps even with respect to different brands or types of cigarettes. The result would be that, in addition to the federal warning, the public would be confronted with a whole universe of warnings, depending upon the points emphasized in particular suits, against particular defendants, before particular juries. Petitioner seems to think that more warnings are always better; but that is, most emphatically, not the view taken by Congress in the Labeling and Advertising Act. Instead, Congress believed, and implemented a plan "whereby," the public was informed by means of a simple, clear, unvarying (or, now, rotating) statement.[41]

---

[41] Congress was of the opinion that an effective warning had to be succinct: lengthy warnings would quickly obscure the "short and direct" cautionary statement that Congress felt to be necessary. 1965 Senate Report 4; *see* note 26, *supra*. *Cf. TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448-49 (1976) ("management's fear of exposing itself to substantial liability may cause it simply to bury the [public] in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking"); *Cotton v. Buckeye Gas Prods. Co.*, 840 F.2d 935, 938 (D.C. Cir. 1988) (excessive warning may be self-defeating); *Finn v. G.D. Searle & Co.*, 35 Cal. 3d 691, 701, 677 P.2d 1147, 1153, 200 Cal. Rptr. 870, 876 (1984) (same); *Andre v. Union Tank Car Co.*, 213 N.J. Super. 51, 66-70, 516 A.2d 277, 285-86 (Super. Ct. Law. Div. 1985), *aff'd*, 216 N.J. Super. 219, 523 A.2d 278 (Super. Ct. App. Div. 1987) (same); Magat, Viscusi, & Huber, *Consumer Processing of Hazard Warning Information*, 1 J. Risk & Uncertainty 201 (1988).

Petitioner contends that Congress was willing to sacrifice uniformity and clarity in order to provide consumers with an adequate warning: according to petitioner, the former were merely "secondary" goals to be pursued only "to the maximum extent consistent with" (§ 1331) the latter, "primary" goal of the Act. Pet. Br. 37-40; ACS Br. 20; *see Carlisle v. Philip Morris, Inc.*, 805 S.W.2d 498 (Tex. Ct. App. 1991); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (1990). If that argument were correct, it presumably would mean that state legislatures (as well as courts) could impose requirements and prohibitions to advance the "primary" goal (a position not taken by petitioner); but, in any event, the argument is not correct. First of all, the language on which petitioner relies ("to the maximum extent consistent with this declared policy," § 1331(2)(*A*)) does not even apply to the declared goals of avoiding "diverse, nonuniform, and confusing" regulations (§ 1331(2)(*B*)). More broadly, the argument utterly misapprehends the nature of the Act: aside from ignoring that a loss of uniformity and clarity hardly *advances* the goal of providing an adequate warning, it erroneously assumes that Congress defined a federal goal of providing adequate warning to consumers and left the methods of achieving that goal unspecified. But Congress expressly said that it was carrying out the policy of "adequately inform[ing]" consumers "*by* inclusion of warning notices" (§ 1331 (emphasis added)) and, beyond that,

carefully defined the means "whereby" the balance of the Act's several goals was to be achieved ("the comprehensive Federal program," § 1331). It is not up to the States, therefore, to seize upon one goal identified by Congress and fashion a state program (statutory or common law) to advance that single goal, regardless of the effect on other goals or on the methods specified by Congress for pursuing the balanced objectives of the statute. *See, e.g., International Paper*, 479 U.S. at 494 ("[I]t is not enough to say that the ultimate goal of both federal and state law is to eliminate water pollution. A state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal.").[42]

The decision by Congress to set the policy in this field —and itself to balance the several goals of the Act— reflects the fact that Congress alone has the broad perspective, both practical and political, to ensure that none of the goals is pursued to the exclusion of the others. For example, in initially deciding not to require warnings in advertisements, and in twice deciding to forestall efforts by the FTC to do so, Congress exhibited a strong concern that such measures would simply go too far— that is, that such warnings would have too great an impact on the interest in protecting the national economy.[43] Pursuant to the scheme that it established, Con-

[42] *See also Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."); *Jones v. Rath Packing Co.*, 430 U.S. 519 (state law would interfere with federal goal of uniformity).

[43] Although petitioner pays little heed to this latter interest, Congress paid considerably more. The legislative history is filled with references to the fact that the tobacco industry employs thousands of workers and accounts for billions of dollars in sales and tax revenues. *See, e.g., 1965 Senate Hearings* 396-97 (Sen. Ervin); 111 Cong. Rec. 13897-98 (1965) (Sen. Bass), 14410

gress continued to monitor this issue, first acquiescing in action by the FTC to impose such a requirement and eventually including a requirement in the statute itself. At all times, however, Congress made clear that it retained, and was willing to use, the ultimate power to step in and to allow or foreclose regulation as it saw fit. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) ("[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."); *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Bd.*, 474 U.S. 409, 422 (1986) (same).

Nothing could be less compatible with this program than a system in which individual juries decide what a manufacturer must and must not say. At best, each jury, guided by the state common law, would be left to balance the competing interests for itself, without regard for the weight assigned to them by Congress. But it may also be that juries would not be told anything at all about protecting commerce or avoiding diverse, nonuniform, and confusing regulation, much less how to weigh those interests. (While such concerns might conceivably be taken into account by state legislatures or administrative agencies—themselves *barred* from striking their own balance—they are not a likely component of jury verdicts.) The policies ascendant in the common law of each State, therefore, would inevitably supplant the national policies established by Congress.[44]

(Rep. Chelf); 115 Cong. Rec. 16189-91 (1969) (Rep. Edwards), 16193-94 (Rep. Fountain), 16294 (Rep. Abbitt).

[44] As the Third Circuit observed in this case, "claims relating to smoking and health that result in liability for noncompliance with warning, advertisement, and promotion obligations other than those prescribed in the Act have the effect of tipping the Act's balance of purposes and therefore actually conflict with the Act." Pet. App. 106a.

2. *Congress Has Not Authorized Interference with Its Policies.*

Petitioner nevertheless advances (Pet. Br. 43-44) the implausible idea that Congress was willing to tolerate frustration of its policies by state tort law. But, if that were truly so, we should not have to guess at it; Congress could easily have done what it did not: include a savings clause, expressly preserving the right to recover at common law (notwithstanding frustration of its policies). Given the fact that Congress broadly preempted "requirement[s] and prohibition[s] . . . imposed under State law," and given that Congress did not include a savings clause to preserve any particular type of state law, it seems quixotic to suggest that Congress nevertheless meant to "save" state law that frustrates the express purposes of the Act. That suggestion, in fact, contradicts the basic rationale of implied preemption doctrine: that Congress does *not* intend to accept frustration of its objectives absent some clear indication to that effect. *See* L. Tribe, *supra*, § 6-25, at 481 n.14 (quoted at note 14, *supra*).

The suggestion seems even more anomalous in light of the fact that, in the very few cases finding preemption of statutes and regulations but not preemption of liability under common law, this Court has placed considerable emphasis on the existence of a savings clause or its practical equivalent. Thus, for example, in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court relied centrally on a provision of the Price-Anderson Act, 42 U.S.C. § 2210 (1982), that, in setting a cap on tort damages for those injured in nuclear accidents, expressly embodied "Congress['s] assum[ption] that persons injured by nuclear accidents were free to utilize existing state tort law remedies" (464 U.S. at 252). Resolving the only question presented in the case, the Court then held that, pursuant to that functional equivalent of a savings clause, those persons could use the remedy of punitive damages as well. In *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, the Court allowed recovery of supplemental workers' compensation awards against a federal contractor, but

the ruling was based on a statute that expressly permitted enforcement of workers' compensation awards in a federal facility "to the same extent" as if the facility were not federal, 40 U.S.C. § 290.[45] Here, unlike in *Silkwood* and *Goodyear Atomic*, there is no statutory provision whatever expressing an intent to allow application of state law in the form of continuing tort actions.[46]

Lacking an actual savings clause or any statutory equivalent, petitioner tries to fashion a makeshift one, using bits and pieces of legislative history. Pet. Br. 29-30, 33-36. But the statute here is unambiguous, in that only one interpretation is consistent with the ordinary meaning of the statutory language and with the structure and policies of the statute as a whole. In these circumstances, " 'judicial inquiry is complete.' " *Burlington N.R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see Norfolk & Western Ry.*, 111 S. Ct. at 1163. Indeed, it is hard to see how the legislative history *could* establish on the part of Congress as a whole a " 'clearly expressed legislative intention to the contrary' " (481 U.S. at 461 (quoting *United States v. James*, 478 U.S. 597, 606 (1986)), where the proposed contrary interpretation

---

[45] In *Goodyear Atomic*, moreover, not only were the amounts of the supplemental awards so small as to create only "incidental regulatory pressure" (486 U.S. at 186), but there was no question of frustrating specific federal decisions addressed to the same subject (scaffold construction) addressed by the State: the question was only one of potential frustration of exclusive federal *ability* to address safety issues.

[46] Similarly, the Comprehensive Smokeless Tobacco Health Education Act of 1986, 15 U.S.C. § 4401 *et seq.*—aside from lacking a guiding statement of purpose like § 1331 and as broad a preemption provision as § 1334—contains an express savings clause that provides: "Nothing in this [Act] shall relieve any person from liability at common law or under State statutory law to any other person." 15 U.S.C. § 4406(c). That provision only highlights the absence of a comparable savings clause in the present Act. *See, e.g., United States v. Rojas-Contreras*, 474 U.S. 231, 234-35 (1985); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 21 (1979). *See also* note 23, *supra*.

would not only be inconsistent with the statutory language but frustrate the policies declared both in the statute itself and throughout the legislative history. *See Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907) (an "act cannot be held to destroy itself").

In any event, petitioner's evidence has little weight even on its own terms, much less when judged against the repeated statements of exclusive federal control, and plenary preemption, within the field. Petitioner cites no supporting statement from any committee report (the best non-textual evidence of any collective understanding); nor does he cite any direct assertion by a legislative sponsor that the preemption provision of the Act was not intended to reach tort suits.[47] Petitioner does point (Pet. Br. 29-30) to the fact that legislative discussion sometimes focused on preemption of legislative and administrative measures, although it was typically sweeping in its description of preemption.[48] But that fact is neither surprising (because such state action presented the most immediate and pressing concern at the time[49]) nor signifi-

[47] Among the types of legislative history, the Court has stressed that Committee Reports are the most authoritative. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986); *Garcia v. United States*, 469 U.S. at 76. The Court has sometimes relied on the statements of sponsors. *See, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 225 (1986).

[48] As to the broad descriptions of preemption, in addition to the statutory language, see, *e.g.*, 1969 Senate Report 1 ("any State or local authority"). 1965 Senate Report 6 ("all Federal, State, and local authorities"), *1969 Senate Hearings* 80 (Mr. Cullman: "any Federal agency, State, or local government"), and *1965 House Hearings* 292 (Mr. Gray: any "Federal, State, or local authority"). *See also* note 22, *supra* (jury is governmental authority).

[49] As noted above (page 15, *supra*), it was state and local legislative and administrative initiatives that were widely being proposed in 1965. Before that time, and indeed at least through the 1970s, there had been very few damages actions against cigarette manufacturers, and none alleging harm from properly manufactured cigarettes (*i.e.*, without a foreign substance introduced into the cigarette) had ever resulted in liability. *See* Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. Cal. L. Rev. 1423, 1425 (1980).

cant (because Congress deliberately used broad, inclusive terms in the Act itself). All that petitioner has left, therefore, is the fact that a few isolated comments by a few individual Members and witnesses at hearings can be construed as reflecting a belief that some damages actions might survive.[50] Even aside from the unreliability of such statements as guides to overall congressional intent (*Garcia*, 469 U.S. at 76 ("[w]e have eschewed reliance on the passing comments of one Member")), the fact remains that "unenacted approvals, beliefs, and desires are not laws." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988).

[50] We discuss briefly the statements relied on by petitioner. Pet. Br. 33-36. (1) Rep. Fascell, who was neither a sponsor of the legislation nor one of the conferees, did not expressly discuss preemption. 111 Cong. Rec. 16543-44 (1965). (2) Mr. Ellenbogen, one witness at one hearing, notes at the very page cited by petitioner that he had "not made a real study" of the liability issue and agreed with a suggestion that the cigarette companies might well view the Act as serving " 'to relieve them from liability and from bothersome and expensive lawsuits.' " *1965 House Hearings* 176. (3) Mr. Cullman, an industry spokesperson, made clear in the exchange excerpted by petitioner that he was referring to pre-1966 suits and that, since he was "not a lawyer," he was merely denying the accusation that the industry had supported the warning in order to relieve it of liability—denying it on the ground that the industry had been "opposed to" the warning. *Cigarette Labeling and Advertising—1969: Hearings Before the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 1st Sess. 580 (1969); *id.* at 577-80. (4) Rep. Watson, after offering his casual reading of the 1965 Act in 1969, referred to the fact that other Members were "apprehensive that the present law might preempt such a right" to sue at common law and, as noted below, took a similar view. *Id.* at 582.

That petitioner's evidence is hardly authoritative is confirmed by statements made by a number of Members suggesting that the 1965 Act precluded, or the 1969 Act would preclude, common law actions against cigarette manufacturers. *See, e.g., id.* at 582 (Rep. Watson: 1969 Act "in all probability would prevent any common law action"); *id.* at 577-81 (Reps. Moss and Dingell); *cf.* 115 Cong. Rec. 16165 (1969) (Rep. McDonald) (in discussion of advertising regulation, evidently referring to manufacturers' increasing disclosure duties under common law).

In short, nothing in the legislative history overrides the plain import of the Act itself.

Lastly, petitioner tries to get at the matter by saying that Congress would not have taken away a remedy for unlawful conduct. But Congress, on numerous occasions, has preempted state remedies without incorporating a similar remedy in the federal scheme.[51] Furthermore, petitioner has mischaracterized what Congress did. In the Act, Congress marked out, within the covered field, what conduct was lawful and what was not: thus, Congress itself set federal standards to which manufacturers must conform, at the same time barring the States from setting other (either more lax or more stringent) standards. It stands to reason that, if the States may not impose additional requirements or prohibitions, they likewise cannot provide "remedies" based upon a failure to comply with additional requirements or prohibitions.[52] The States remain free, of course, to extend remedies for conduct that is outside the coverage of the Act (*see* page 14, *supra*, and note 54, *infra*), but they may not go further and override the judgment made by Congress about the extent of legal obligations to be imposed on manufacturers.

The absence of state damage awards will not mean, as petitioner contends, that cigarette companies can nullify the warning or make misrepresentations with impunity.

---

[51] *See, e.g., Pilot Life*, 481 U.S. at 55; *Wisconsin Dep't of Indus. v. Gould, Inc.*, 475 U.S. 282, 287, 289 (1986); *Kalo Brick*, 450 U.S. at 322-23; *WDAY, Inc.*, 360 U.S. at 535; *cf. Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). *See also United States v. Smith*, 111 S. Ct. 1180 (1991) (preemption of state tort claims against federal officer even if no remedy against United States under FTCA).

[52] Petitioner cannot properly argue that the inclination of States to provide a remedy should be given priority over the federal program. As this Court pointed out in *Garmon*: "Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." 359 U.S. at 246-47. *See* note 13, *supra* (purpose of state law cannot save it if effect is to frustrate federal law).

Petitioner simply ignores the fact that Congress and the FTC may deal with any behavior of that nature, should it occur. In the Act, Congress not only confirmed the authority of the Commission to regulate "unfair or deceptive acts or practices in the advertising of cigarettes," it required the Commission to make annual reports concerning "(A) the effectiveness of cigarette labeling, (B) current practices and methods of cigarette advertising and promotion, and (C) such recommendations for legislation as it may deem appropriate." §§ 1336, 1337. In addition to expecting the FTC to remedy any unfair or deceptive advertising or promotion that might undermine the effectiveness of the mandated warnings, Congress thereby indicated its own intention to monitor promotional practices within the industry and to authorize additional action if that should prove necessary.[53] The question, therefore, is not *whether* misconduct will be regulated, but *by whom* it will be regulated. Under the Act, that responsibility rests with the federal government, not the various States.

C. The Claims Before This Court Are Preempted.

We do not contend, of course, that the Labeling and Advertising Act preempts every possible claim that might be brought against cigarette manufacturers.[54] But all of the claims in this case—involving, as they do, attacks on

---

[53] The FTC has in fact closely regulated cigarette advertising and promotion. *See* page 22, *supra*. Moreover, each of the FTC's annual reports since the 1965 Act has contained a section informing Congress about current advertising and promotional practices by the industry, and Congress has relied on them in revising the statutory scheme. *See* note 19, *supra*.

[54] Thus, for example, as we have already indicated, a design-defect claim alleging the existence of a safer alternative design would not be preempted, at least to the extent that it did not implicate the warnings or information given to consumers. It is simply inaccurate, therefore, to say (Pet. Br. 43) that if the Act preempts common law as well as statutory law, manufacturers will be able to escape liability for actions like deliberately introducing harmful additives into their products.

warnings given by manufacturers or on their advertising and promotional practices—are preempted.

The basic claim at issue here alleges a failure to warn of the health effects of smoking. That claim, whether framed in terms of negligence or strict liability, asserts that respondents failed to fulfill a duty to warn consumers adequately about possible hazards of using their products. *Restatement (Second) of Torts* § 402A, comment *j* ("In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use."); *Feldman*, 97 N.J. at 452, 479 A.2d at 386. It effectively asks a jury to find that the warnings given by respondents—the very warnings that Congress has written and ordered respondents to provide—were inadequate under state law. Indeed, that is just what the judge told the jury in this case (with respect to the pre-1966 claims): "you are not limited by the language of the warning required by Congress. . . . [Y]ou are free to determine what the warnings should have been. You may determine that a greater or lesser warning was required prior to 1966." Tr. 12,737.[55]

It is bizarre to think that Congress, which elected to require one particular warning and even wrote the warning itself, meant to allow individual juries throughout the country "to determine what the warnings should have been" or "to determine that a greater or lesser warning was required." But that, of course, is the ultimate issue in every failure-to-warn case. The language of Section 1334—"[n]o statement relating to smoking and health . . . shall be required" and "[n]o requirement or prohibition based on smoking and health shall be imposed"—simply does not allow for States to demand, by means of

[55] The trial judge gave this instruction in an effort to indicate that, as far as pre-1966 claims were concerned, the jury could determine what warning was required without being constrained by the choice made by Congress as part of the regulatory scheme established by the Act. If petitioner were to prevail here, the same sort of instruction presumably would be sought for post-1965 claims as well.

tort suits or anything else, that manufacturers give additional warnings about the relationship between smoking and health. And, the language of Section 1334 aside, to require additional warnings pursuant to state law would be flatly inconsistent with the "comprehensive Federal program" whereby consumers are to be "adequately informed" by means of the warning required by *federal* law. Thus, the court of appeals in this case, in common with every federal court of appeals that has decided this issue, correctly held that the failure-to-warn claims are preempted. *See* Pet. App. 106a.[56]

The remaining claims (express warranty, intentional misrepresentation, and conspiracy) fare no better. All of them attack advertising and promotional materials based on the assertion that they make false or deceitful communications about the health effects of smoking, irrespective of the existence of the warning. All of them, therefore, are expressly preempted by Section 1334(b), which bars any health-based "prohibition" or "requirement" with respect to advertising or promotion of properly labeled cigarettes. That language, on its face, could not more clearly block States from imposing either affirmative or negative duties regarding such activities. And even were the language less plain, it is self-evident that to permit States to set varying standards with regard to advertising—saying, for example, that certain advertisements could not be run within a particular State—

[56] The Third Circuit stated: "where the success of a state law damage claim necessarily depends on the assertion that a party bore the duty to provide a warning to consumers in addition to the warning Congress has required on cigarette packages, such claims are preempted as conflicting with the Act." Pet. App. 106a. *See Pennington*, 876 F.2d 414; *Roysdon*, 849 F.2d 230; *Stephen*, 825 F.2d 312; *Palmer*, 825 F.2d 620. *See also Gianitsis v. American Brands, Inc.*, 685 F. Supp. 853 (D.N.H. 1988); *Kotler v. American Tobacco Co.*, 685 F. Supp. 15 (D. Mass. 1988), *aff'd*, 926 F.2d 1217 (1st Cir. 1990), *cert. pending*, No. 90-1473 (filed March 19, 1991); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149 (E.D. Pa. 1987); *Forster*, 437 N.W.2d 655; *Hite v. R.J. Reynolds Tobacco Co.*, 396 Pa. Super. 82, 578 A.2d 417 (Super. Ct. 1990); *Phillips v. R.J. Reynolds Indus., Inc.*, 769 S.W.2d 488 (Tenn. Ct. App. 1988).

would lead to just the sort of diverse, nonuniform, state-by-state obligations that Congress meant to preclude. Thus, as a matter of both plain language and express statutory policy, those claims are incompatible with the Act.

Petitioner makes a fallback argument (Pet. Br. 45-50) that, even if the Act preempts some tort claims in this area, it does not preempt "intentional torts."[57] But this line between preempted and unpreempted claims is entirely imaginary. Most particularly, in drawing the line petitioner takes no account of (indeed, does not even refer to) the broad language of Section 1334(b), which admits of no exception whatever based on "intent." Moreover, if the Act were read to exempt prohibitions with regard to certain kinds of "intentional" misconduct, then it would follow that the exemption would extend to such prohibitions under any kind of state law, tort or not. That would mean that each of the 50 state legislatures could establish an administrative agency with power to review cigarette advertising and to prohibit, or fine manufacturers for including, any material deemed "intentionally" misleading (except, presumably, the warning itself). It is simply inconceivable that Congress meant to permit such overlapping schemes to exist, given the fact that it explicitly and unequivocally preempted *any* prohibition under state law with respect to the advertising and promotion of properly labeled cigarettes. *See* Pet. App. 90a (quoting *id.* at 106a) (finding intentional tort claims preempted because they "manifestly 'challenge[] . . . the propriety' of the defendants' 'actions with respect to the advertising and promotion of cigarettes' ").[58]

---

[57] We note that this fallback proposal does not cover petitioner's express warranty claim, because no proof of intentional misrepresentation is required to recover on that claim. *See* Tr. 12,747 (jury instruction: "It is not a defense for Liggett to claim it was unaware that the statements [the alleged warranties] were untrue.").

[58] Although petitioner relies heavily on *Forster v. R.J. Reynolds Tobacco Co.*, *supra*, the analysis in that decision is no more sound than that put forward by petitioner. The court in *Forster* neither comes to grips with the language of Section 1334(b) nor satisfactorily explains why Congress would carve out this exception to its preemption of state law. Its attempt at the latter—saying that, otherwise, manufacturers would have a "license to lie" (437 N.W.2d at 662)—simply disregards the FTC's authority, specifically reaffirmed by Congress, to deal with any such conduct. *See* pages 44-45, *supra*.

Even apart from the language of Section 1334(b), moreover, the line proposed by petitioner is indefensible. To sustain it, petitioner must be able to establish that, for purposes of the Act, challenges to statements in advertising and promotional materials can be viewed separately from challenges to the warning (which, for purposes of the line, he admits are preempted). But whether any particular statements are actually misleading does not depend just on the statements themselves, but on their effect in the context of all information available to consumers, *including the warning*. By the same token, it is clear that Congress did not consider the adequacy of the warning in a vacuum, without regard to what cigarette manufacturers said in advertising and promotion: to the contrary, in drafting the warning, it was well aware of the nature and extent of existing advertising and promotion.[59] It must be assumed, therefore, that Congress believed that the federal warning would not be rendered inadequate by affirmative statements in advertising and promotion, given that Congress explicitly relied upon the FTC to sanction such statements if they were deemed misleading.

In short, Congress established its own carefully designed system to regulate this area and to preclude both positive and negative state obligations. Petitioner and his supporting *amici* plainly would prefer a different system. But they should not be allowed to rewrite the Labeling and Advertising Act in order to incorporate that preference.

---

[59] *See, e.g.*, 1965 Senate Report 22 (quoting FTC statement that " 'the Commission has reason to believe that much current advertising suggests or portrays cigarette smoking as being pleasurable or desirable; compatible with physical health, fitness, or well-being; or indispensable to full personal development and social success' "); *id.* at 4 (noting FTC's "exhaustive examination of advertising, labeling, and other promotional practices in the cigarette industry").

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

H. BARTOW FARR, III *
RICHARD G. TARANTO
KLEIN, FARR, SMITH
& TARANTO
2550 M Street, N.W.
Washington, DC 20037
(202) 775-0184
Attorneys for Respondents

* Counsel of Record

Of Counsel:

MUDGE, ROSE, GUTHRIE,
ALEXANDER & FERDON
180 Maiden Lane
New York, NY 10038

ARNOLD & PORTER
1200 New Hampshire Ave., N.W.
Washington, DC 20036

SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

July 10, 1991